

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 189

MRS. ZILLAH LYON, PETITIONER,

vs.

**MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 2, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 189

MRS. ZILLAH LYON, PETITIONER,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Jno. W. Nance, filed July 12, 1937, omitted in printing.

[fol. 2] [Caption omitted]

IN CIRCUIT COURT OF BENTON COUNTY

MRS. ZILLAH LYON, Plaintiff,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. OF OMAHA,
NEBRASKA, Defendant

COMPLAINT AT LAW—Filed October 31, 1936

Comes now the plaintiff, Zillah Lyon and complains of the defendant herein, and for cause of action alleges and states:

That plaintiff is a resident citizen of the city of Rogers, Benton County, Arkansas, and the widow of William R. Lyon now deceased; that the defendant is a foreign insurance corporation, authorized to do business within the state of Arkansas and to sue and be sued in the courts of said state; that the defendant is engaged in the business of insuring its policy holders against loss of life resulting from accidental causes; with its principal offices and place of business in the City of Omaha, in the State of Nebraska.

[fol. 3] That on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of life and accident insurance, No. 60-J-20343, by the terms of which said defendant, for and in consideration of the sum of \$74.00 premium for the first year, paid in advance, and the sum of \$64.00 annually hereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the first day of April, 1927, agreed to and did insure the said William R. Lyon in the sum of \$2000.00, against loss of life resulting from accidental causes, and in said policy of insurance the plaintiff is named as beneficiary; a true copy of the material portions of said policy of insurance is hereto attached, marked Exhibit A and pleaded as a part of this complaint.

That on the 19th day of July, 1934, while said policy of insurance was in full force and effect, the said William R.

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Lyon lost his life from accidental causes; that on the 17th day of July, 1934, he was riding on a motor car on the Wichita Falls & Northwestern Railroad, near the city of Breckenridge in the state of Texas, when said motor car accidentally collided with an automobile, as a result of which the said William B. Lyon sustained personal injuries, from the effects of which he died on the said 19th day of July, 1934.

That within the time prescribed by the terms of said policy, the plaintiff furnished to said defendant company notice of the death of the insured, and formal proof of said death, which said notice and proof were accepted by the defendant without exception, but notwithstanding all dues and premiums had been paid on said policy of insurance and that the insured and the plaintiff had fully performed the conditions and requirements of said policy, the defendant has failed and now refuses to pay the sum due plaintiff thereon.

That it is provided in part (C) of said policy of insurance as follows, to-wit:

"After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00."

That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including 1934, making seven annual renewals, which entitles the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1400.00, but the plaintiff waives and remits the sum of \$400.00 due her [fol. 4] under this clause in said policy of insurance and claims only the sum of \$1,000.00 under said clause.

That in a rider attached to said policy it is provided as follows:

"In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured", but plaintiff waives her rights under this clause and makes no claim thereunder.

That the plaintiff is entitled to recover of and from the defendant company the total sum of \$2999.68, together with penalty for failure to pay the sum due within the time prescribed by the terms of the policy.

That on the first day of September, 1934, the plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and therefore the sum due the plaintiff on said policy became due and payable on or before the first day of November, 1934, and by reason of the defendant's failure to pay the said sum due within sixty days next after receipt of the proof of death, plaintiff is entitled to recover a penalty thereon in a sum equal to 12% of the sum due her on said policy, in the sum of \$359.88, together with a reasonable attorney's fee to be fixed by the court, which plaintiff alleges to be the sum of \$350.00.

The plaintiff further alleges that in said policy of insurance the following provision appears as provision "C" on the 3rd page of the policy, to-wit:

"The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application, and the payment in advance of \$74.00 premium the first year and the payment in advance of premiums of \$64.00 annually or \$16.00 quarterly thereafter, beginning with April first, 1927; is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least 15 days prior to the date they are due shall constitute legal notice of dues."

[fol. 5] By the terms of provision "C" aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the city of Rogers, Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from

the insured at any time it was most convenient for the insured to make such payments, and the defendant company thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

That on and prior to the first day of January, 1934, one Roy E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the City of Rogers, Arkansas, duly authorized to collect premiums from the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said local treasurer was absent from his office in the city of Rogers, and plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying said premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said City of Rogers, and purchased a [fol. 6] postal money order for the sum of \$16.00, made payable to the defendant, and deposited same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right

to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy, had waived its rights to declare a forfeiture for nonpayment of said premium on said first day of July.

Third. That said premium was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

Wherefore, the plaintiff prays that summons issue, commanding the defendant to answer herein and that upon a trial of the issues joined, that plaintiff be awarded judgment against the defendant in the sum of \$2999.68 as the amount of benefits due under the terms of said policy of insurance, and interest thereon, at the rate of 6%, from the first day of November, 1934, to date of judgment herein, together with a penalty thereon in a sum equal to 12% thereof, in the sum of \$359.88; and a reasonable attorney's fee to be fixed by the court in the sum of \$350.00, and plaintiff's costs in this action laid out and expended and all other relief to which the plaintiff may be entitled in the premises.

Zillah Lyon, Plaintiff, by J. W. Nance, Her Attorney.

[File endorsement omitted.]

[fol. 7] (Note by Clerk of Trial Court: Here follows in the Complaint a copy of the policy of insurance. This policy of insurance is set out identically in the Bill of Exceptions, [marginal] page 25 of this transcript, and is therefore not recopied here.)

IN CIRCUIT COURT OF BENTON COUNTY

SUMMONS AND RETURN—Filed Nov. 10, 1936

The State of Arkansas to the Sheriff of Pulaski County,
Greeting:

You Are Hereby Commanded To summon Mutual Benefit Health & Accident Association of Omaha, Nebraska, to answer in twenty days after the service of this summons upon it a complaint filed against it in the Benton County Circuit Court by Mrs. Zillah Lyon and warn it that upon its failure to answer, the complaint will be taken for confessed; and you will make due return of this summons within twenty days after the date of service had.

Witness my hand and the seal of said court this 31st day of October, 1936.

Fred Allred, Clerk. (Seal.)

STATE OF ARKANSAS,

County of Pulaski, ss:

This is to certify that on this 4th day of November, 1936, I have duly served the within writ by delivering a copy and stating the substance thereof to the within named Mutual Benefit Health & Accident Association of Omaha, Nebraska, by delivering a [grue] copy to U. A. Gentry, State Ins. Com. the agent designated for service, in Pulaski County, Arkansas.

L. B. Branch, Sheriff, by W. E. Thackmorton, D. C.

[File endorsement omitted.]

IN CIRCUIT COURT OF BENTON COUNTY

NOTICE OF FILING OF PETITION AND BOND ON REMOVAL

To Mrs. Zillah Lyon, Plaintiff, or her attorney, J. W. Nance:

You are hereby notified that petition and bond for removal to the United States District Court for the Western [fol. 8] District of Arkansas, Fort Smith Division, will be filed in the above court in the above cause on the 20th day of November, 1936.

Mutual Benefit Health & Accident Association, by
Pryor & Pryor, Attorneys,

Copy of the within notice received and service thereof
waived this 20th day of November, 1936.

Mrs. Zillah Lyon.

IN CIRCUIT COURT OF BENTON COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed November 20, 1936

To the Honorable Circuit Court:

Your petitioner, Mutual Benefit Health and Accident Association, respectfully shows that the matter in dispute in the above entitled and numbered suit exceeds the sum of Three Thousand Dollars, exclusive of interests and costs; that the said suit is purely of a civil nature; that the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner, the defendant in the above entitled and numbered suit, was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Nebraska, and was at the time of the commencement of this suit, and still is, a corporation duly formed, created, organized, acting and existing under and by virtue of the laws of the state of Nebraska, and was then, and at all times has been, and still is, a citizen and resident of said State of Nebraska; that the plaintiff in said cause was at the commencement of the suit, and at all times since has been, and still is, a resident and citizen of the state of Arkansas, and that the controversy in said suit is now, and at the time of the commencement thereof was, wholly between citizens of different states.

Your petitioner further shows that the time within which it is required, under the laws of the State of Arkansas, and the rules of said court in which said suit is brought, to answer and plead to the petition, declaration or complaint of the plaintiff, has not yet expired, and your petitioner [fols. 9-10] offers herewith bond with good and sufficient surety in the sum of Five Hundred Dollars for its entry in the District Court of the United States for the Western District of Arkansas, Fort Smith Division, within thirty days from the date of the filing of this petition, a copy of the record in this case, and for paying all costs that may be

awarded by said district court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, defendant prays this Honorable Court to proceed no further herein except to accept this petition and said bond and to make the order of removal required by law, and to cause the record herein to be removed to said District Court of the United States for the Western District of Arkansas, Fort Smith Division, and in duty bound will it ever thus pray.

Pryor & Pryor, Attorneys of Record for Mutual Benefit Health and Accident Association.

Duly sworn to by T. B. Pryor, Jr. Jurat omitted in printing.

[File endorsement omitted.]

Bond on Removal for \$500.00, approved and filed November 20, 1936, omitted in printing.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
ARKANSAS, FORT SMITH DIVISION

Law. No. 1990

MRS. ZILLAH LYON, Plaintiff,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF
OMAHA, NEBRASKA, Defendant

ANSWER—Filed December 18, 1936

Comes the defendant, Mutual Benefit Health & Accident Association of Omaha, Nebraska, and for its answer herein states:

That it denies each and every material allegation of the plaintiff's complaint.

Wherefore, having fully answered, defendant prays that it be discharged hence with all of its costs in this behalf laid out and expended.

Pryor & Pryor, Attorneys for Defendant.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED COMPLAINT AT LAW—Filed February 2, 1937

Comes now the plaintiff Zillah Lyon and complains of the defendant herein and for cause of action, alleges and states:

That plaintiff is a resident citizen of the city of Rogers, Benton County, Arkansas, and the widow of William R. Lyon, now deceased; that the defendant is a foreign insurance corporation, authorized to do business within the State of Arkansas, and to sue and be sued in the courts of said state; that the defendant is engaged in the business of insuring its policy holders against loss of life resulting from accidental causes; with its principal office and place of business in the City of Omaha, in the State of Nebraska.

That on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of life and accident insurance, #60J20343, by the terms of which said defendant, for and in consideration of the sum of \$74.00 premium for the first year, paid in advance, and the sum of \$64.00 annually thereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the first day of April, 1937, agreed to and did insure the said William R. Lyon in the sum of \$2000.00, against loss of life resulting from accidental causes, and in said policy of insurance the plaintiff is named as beneficiary; a true copy of the material portions of said policy of insurance is hereto attached, marked Exhibit A and pleaded as a part of this complaint.

That on the 19th day of July, 1934, while said policy of insurance was in full force and effect, the said William R. Lyon lost his life from accidental causes.

That within the time prescribed by the terms of said policy, the plaintiff furnished to said defendant company notice of the death of the insured, and formal proof of said

death, which said notice and proof were accepted by the defendant without exception, but notwithstanding all dues and premiums had been paid on said policy of insurance and that the insured and the plaintiff had fully performed the conditions and requirements of said policy, and made due demand for payment, the defendant has failed and now refuses to pay the sum due plaintiff thereon.

[fol. 13] That it is provided in part (C) of said policy of insurance as follows, to-wit:

“After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00”.

That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including the year 1933, making six annual renewals, which entitles the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1200.00.

That in a rider attached to said policy it is provided as follows:

“In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured.”

That the insured paid all premiums due thereon in the sum of \$464.00, and an additional sum of \$48.00; that under said clause plaintiff is entitled to recover the sum of \$478.00, including interest at the rate of 4% annually.

That the plaintiff is entitled to recover of and from the defendant company benefits in the total sum of \$3678.00.

That on the first day of September, 1934, the plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and therefore the sum due plaintiff on said policy became due and payable on or before the first day of November, 1934, and by reason of the defendant's failure to pay the said sum due within sixty days next after receipt of the proof of death, plaintiff is entitled to

cover a penalty thereon in a sum equal to 12% of the sum due her on said policy, in the sum of \$465.36, together with a reasonable attorney's fee to be fixed by the court, which plaintiff alleges to be the sum of \$350.00.

The plaintiff further alleges that in said policy of insurance the following [provision] appears as provision "C" on the third page of the policy, to-wit:

"The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of premiums of \$74.00 the first year and the payment in advance of premiums of \$64.00 annually or \$16.00 quarterly thereafter, beginning with April 1st, 1927; is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least 15 days prior to the date they are due shall constitute legal notice of dues."

By the terms of provision "C" aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the City of Rogers, Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from the insured at any time it was most convenient for the insured to make such payments, and the defendant thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska on the day same became due and payable.

That on and prior to the first day of January, 1934, one E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the city of Rogers, Arkansas, duly authorized to collect premiums from

the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of [fol. 15] July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said city of Rogers and purchased a postal money order for the sum of \$16.00, made payable to the defendant; and [depos-] same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy had waived its right to declare

forfeiture for nonpayment of said premium on said first day of July.

Third. That said premium had been previously paid and therefore was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

Wherefore, the plaintiff prays that a summons issue, commanding the defendant to answer herein and that upon a trial of the issues joined, that plaintiff be awarded judgment against the defendant in the sum of \$3678.00, as the amount of benefits due under the terms of said policy of insurance, and interest thereon, at the rate of 6% from the first day of November, 1934, to date of judgment herein, together with a penalty thereon in a sum equal to 12% thereof, in the sum of \$465.36, and a reasonable attorney's fee to be fixed by the court, in the sum of \$350.00, to be [fol 16] charged as costs in this suit, together with all of plaintiff's costs in this action laid out and expended, and all other relief to which the plaintiff may be entitled in the premises.

Zillian Lyon, Plaintiff, by J. W. Nance, Her Attorney.

(Note By Clerk of Trial Court: Here follows in the First Amended Complaint a copy of the policy of insurance. This policy of insurance is set out identically in the Bill of Exceptions, [marginal] page 25 of this transcript, and is therefore not recopied here.)

IN UNITED STATES DISTRICT COURT

DEMURRER TO FIRST AMENDED COMPLAINT—Filed May 27, 1937

Comes the defendant and demurs to the First Amended complaint of the plaintiff and for grounds states:

That said First Amended Complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore, defendant prays that said First Amended complaint of the plaintiff be dismissed and that it be discharged hence with all of its costs.

Pryor & Pryor, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Entered June 2, 1937

(Heartsill Ragon, Judge)

This June 2, 1937, comes the plaintiff by John W. Nance, her attorney, and comes the defendant by Brady Pryor, its attorney, and comes on to be heard the demurrer of said defendant to the complaint of the plaintiff in the above entitled cause. The demurrer is argued by counsel and submitted and upon consideration thereof the court doth overrule the same. To which ruling the defendant excepts.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER TO FIRST AMENDED COMPLAINT—Filed June 3, 1937

Comes now the defendant and for its answer to the First Amended Complaint of the plaintiff states:

Admits that plaintiff is a resident citizen of the City of Rogers, Benton County, Arkansas, and the widow of William R. Lyon, now deceased; denies that the defendant is a foreign insurance corporation, but states the facts to be that it is a mutual benefit health and accident association and as such is authorized to do business in the State of Arkansas.

Admits that on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of accident insurance No. 60J-20343, and states the facts to be that said policy was not a life insurance policy within the strict meaning of that term. Defendant admits that by the terms of said policy, for and in consideration of the sum of \$74.00 premium for the first year, paid quarterly in advance, and the sum of \$64.00 annually thereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the 1st day of April, 1927, it agreed to and did insure the said William R. Lyon in the sum of \$2,000.00 against loss of life resulting from accidental causes and in said policy of insurance the plaintiff was named as beneficiary. Admits that a true copy of said policy is attached to the complaint.

Admits that on the 19th day of July, 1934, the said William R. Lyon, deceased, lost his life from accidental causes,

but denies that said policy of insurance was in full force and effect on that date, and states the facts to be that said policy had expired by its own terms on the 1st day of July, 1934.

Denies that within the time prescribed by the terms of said policy that the plaintiff furnished to the defendant notice of the death of the insured and formal proof of said death, and denies that said notice and proof were accepted by the defendant without exception. Denies that the dues and premiums had been paid on said policy of insurance, and denies that the insured and the plaintiff, or either of them, had fully performed the conditions and requirements [fol. 18] of said policy. Admits that the defendant refuses to pay the plaintiff thereon, and specifically denies that any sum whatever is due plaintiff thereon.

Denies that plaintiff is entitled to recover anything by virtue of part (C) of the policy of insurance. Denies that the plaintiff is entitled to recover any sum whatever by virtue of the rider attached to said policy.

Denies that the insured paid all premiums due thereon in the sum of \$464.00 and an additional sum of \$48.00, and denies that plaintiff is entitled to recover under said clause any sum whatever.

Denies that the plaintiff is entitled to recover of and from the defendant benefits in the total sum of \$3,678.00, or any other sum.

Denies that on the 1st day of September, 1934, that plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and denies that any sum ever became due the plaintiff on or before the 1st day of November, 1934, or at any other time by reason of the death of the insured. Denies that plaintiff is entitled to recover penalty or attorney's fees as prayed for in the complaint.

The defendant admits, as before stated, that a true copy of the insurance policy is attached to the complaint. Admits that by the terms of provision (C) set forth in the complaint that the defendant company attempted and did provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable. Admits that defendant appointed an agent in the City of Rogers, Arkansas, designated by the defendant as its local treasurer, to collect premiums from the assured, and other policyholders, but denies that said agent had any authority, either real or apparent, to waive the time for payment of premiums. Denies that said treasurer by long continued

practice without objection on the part of the defendant established the custom of receiving premiums out of time, and denies that it was for a long period of years customary for said local treasurer to receive payment of premiums from the assured at any time that it was most convenient for the assured to make such payments, and denies that the defendant thereby waived its right to declare a forfeiture of the rights of the assured under said policy because of failure [fol. 19] to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

Defendant states, by way of further answer to that part of the complaint, that the policy sued on herein terminated by its own terms on the 1st day of July, 1934; that it was unnecessary to declare a forfeiture, as the policy had terminated at the expiration of the period for which a premium had been paid in advance.

Admits that on and prior to the 1st day of January, 1934, one Roy E. Hamilton, was authorized to collect premiums for the defendant, but denies that he had any other authority, and specifically denies that he had any authority to waive any of the provisions of the insurance policy, and specifically denies that he had any authority to accept premiums after said premiums became due and payable. Admits that said collecting agent had been acting as such for more than five years prior to January 1, 1934. Defendant specifically states that said Roy E. Hamilton had no further connection with the defendant on and after said 1st day of January, 1934. Admits that the insured had been accustomed to paying his premiums to said agent for a period of time prior to the 1st day of January, 1934. Denies that by the terms of said policy of insurance the defendant was required to give the insured notice of the time the said premiums were due and payable. Denies that the defendant without any notice to the insured changed its method of collecting premiums and required same to be paid in the City of Little Rock, Arkansas, but admits that said premiums were required to be sent by mail to an agent of the defendant company in said City of Little Rock, Arkansas, instead of being paid to said local treasurer. Denies that on the 1st day of July, 1934, or on any other date, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company. Denies that said plaintiff was unable to locate said agent for several days, and denies that on the 6th day of July, 1934, or

any other day, plaintiff located said agent, and denies that plaintiff was informed by said agent that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the City of Little Rock, Arkansas. Admits that plaintiff went to the United States Postoffice in the City of Rogers, and purchased a postal money order in the sum of \$16.00 payable to the defendant and deposited same in the postoffice properly addressed to the defendant; admits that it was in due time [fol. 20] received by the defendant; admits that the defendant refused to accept payment of said premium, but denies that said refusal to accept was on the ground that the premium was not paid on the 1st day of July, 1934, and denies that the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said 1st day of July, but alleges the facts to be that said policy expired by its own terms on the said 1st day of July, 1934, and under the provisions of the insurance contract the defendant was not required to accept renewal premiums. Denies that the defendant was without right to claim and declare a forfeiture of said policy for the nonpayment of said premium on the 1st day of July, 1934, for any reason.

The defendant denies that it failed and neglected to give the insured notice of the time said premium was due and payable by the terms of said policy, and specifically denies that the defendant was required to give any notice.

Denies that the defendant by its acts and conduct established a custom of receiving payments of premiums out of time; denies that it changed the method of payment from that provided in the policy, and denies that it waived its right to declare a forfeiture for the nonpayment of said premium on the 1st day of July, and specifically denies that said premium had been previously paid and, therefore, was not due and payable on said 1st day of July.

Further answering, the defendant states that the policy had expired by its own terms on the 1st day of July, 1934; that the insured died on the 19th day of July, 1934, nineteen days after the expiration of the insurance contract, and plaintiff is not entitled to recover in this action. The policy in part provides (D of additional provisions):

"The term of this policy begins at twelve o'clock noon, standard time, on date of issue against accident . . . and ends at twelve o'clock noon on date renewal is due."

The defendant pleads specifically said provision of the insurance contract as a bar to plaintiff's right of recovery herein.

Further answering, the defendant states that the policy sued on herein provides (C of additional provisions):

" * * * The acceptance of any premium on this policy shall be optional with the Association * * * "

[fol. 21] And the defendant specifically pleads said provision of the policy as a bar to the right of the plaintiff to recovery herein.

Defendant alleges and states that under the provisions of the insurance contract that the defendant had the right to refuse to extend for any period of time beyond the period for which the premium had been paid in advance, and that it did refuse to insure the plaintiff for an additional period of time beyond the said 1st day of July, 1934.

Wherefore, having fully answered, defendant prays that the first amended complaint of the plaintiff be dismissed and that it be discharged hence with all of its costs in this behalf laid out and expended.

Pryor & Pryor, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JURY EMPANELED; TRIAL, JUNE 3, 1937—Entered June 3, 1937

(Heartsill Ragon, Judge)

This day comes the plaintiff by John W. Nance, her attorney, and comes the defendant by Brady Pryor and Malcolm W. Gannaway, its attorneys, and the parties announcing ready for trial come the following named persons as jurors for the trial of this cause, to-wit:

Ila Harrison,
G. A. Watts,
J. H. Byers,
R. L. Harper,
L. T. Nolen,
L. P. Stroble,

W. G. O'Neal,
Willis Warren,
L. J. Lee,
E. A. Cowan,
M. V. B. Harris,
Mode Robinson,

twelve good and qualified electors of the Fort Smith Division of the Western District of Arkansas, duly selected, impaneled and sworn. The case being stated by counsel and having heard the evidence adduced, at the hour of adjournment the further consideration thereof is postponed until tomorrow morning, 10 o'clock, and the jury permitted to separate under the admonition of the court until that hour.

IN UNITED STATES DISTRICT COURT

[Title omitted]

TRIAL, JUNE 4, 1937; VERDICT—Entered June 4, 1937

(Heartsill Ragon, Judge)

This day come the parties hereto by their attorneys, and comes the jury heretofore empaneled and sworn herein, as on yesterday, and the trial of this cause proceeds, and the remainder of the evidence is adduced. At the conclusion of all of the evidence, by direction of the court, the jury returned from the box the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of \$3678.00.
E. A. Cowan, Foreman."

Whereupon, the jury is discharged from the further consideration of the case.

IN UNITED STATES DISTRICT COURT

(Heartsill Ragon, Judge)

Law. No. 1990

MRS. ZILLAH LYON, Plaintiff,

VS.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF
OMAHA, NEBRASKA, Defendant

JUDGMENT, ORDER DENYING PLAINTIFF'S APPLICATION FOR
ASSESSMENT OF PENALTY, ORDER ALLOWING PLAINTIFF'S
ATTORNEY'S FEE, AND ORDER ALLOWING DEFENDANT NINETY
DAYS IN WHICH TO FILE BILL OF EXCEPTIONS—Entered
June 9, 1937

A verdict for the plaintiff having been duly returned by
the jury in this cause for the sum of \$3678.00 on the 4th day
of June, 1937:

[fol. 23] Now, on motion of John W. Nance, attorney for
the plaintiff, it is by the court considered, ordered and
adjudged that the plaintiff, Mrs. Zillah Lyon have and re-
cover of defendant, Mutual Benefit Health & Accident As-
sociation of Omaha, Nebraska, the sum of \$3678.00, found
by said jury, together with all costs by the plaintiff in this
behalf laid out and expended, and an attorney's fee in the
sum of \$250.00, for which plaintiff may have execution.

To all of which defendant excepts.

Plaintiff also prays judgment for a penalty equal to 12
per cent of the principal amount of said recovery, which
prayer is by the court denied, to which denial plaintiff
excepts.

Thereupon, defendant in open court gives notice of ap-
peal and prays and is by the court allowed ninety days from
this date in which to file its bill of exceptions.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed July 12, 1937

Be It Remembered that on the 3rd day of June, 1937, the above entitled cause came on for hearing before the Honorable Heartsill Ragon, Judge presiding, and both parties announcing ready for trial, a good and lawful jury being impaneled and sworn to try the issues jointly, the following proceedings were had, to-wit:

Appearances:

John W. Nance for plaintiff.

T. B. Pryor, Jr., for defendant.

Thereupon the plaintiff, to maintain the issues on her behalf to be maintained, introduced the following evidence:

MRS. ZILLAH LYON, called as a witness on behalf of plaintiff testified in substance as follows:

[fol. 24] That she is the widow of William R. Lyon, deceased; that Mr. Lyon died on the 19th day of July, 1934, by accidental means (which was admitted by the defendant). It was then admitted that due proof of death was furnished the defendant.

That Mr. Lyon purchased a policy of insurance from the defendant; that the policy was sold by Mr. Cottingham, agent of the Company at Rogers, Arkansas. She was present when the policy was purchased. She identified the policy, and it was introduced in evidence. The policy is in words and figures as follows, to-wit:

(Here follow four photolithographs, side folios, 25, 25a, 26, 26a)

THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB,
SIGHT OR TIME BY ACCIDENTAL MEANS, OR LOSS OF TIME
BY SICKNESS AS HEREIN PROVIDED

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION

OMAHA

Monthly Benefits \$100.00
Maximum Monthly Benefits \$200.00

(Herein called Association)
DOES HEREBY INSURE

Death Benefit Without Increase \$2,000
Maximum Death Benefit \$4,000

INSURING
CLAUSE

WILLIAM R. LYON

(Herein called the Insured)

of City of **ROGERS** State of **ARKANSAS**.

against loss of life, limb, sight, or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

PART A.

SPECIFIC LOSSES

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life	\$2,000.00	For Loss of One Hand and One Foot	\$2,000.00
For Loss of Both Eyes	2,000.00	For Loss of Either Hand	750.00
For Loss of Both Hands	2,000.00	For Loss of Either Foot	750.00
For Loss of Both Feet	2,000.00	For Loss of Either Eye	500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

PART B.

DOUBLE REGULAR DEATH BENEFIT

If the Insured sustains injuries as described in the Insuring Clause, while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in the death of the Insured within thirteen weeks from the date of the accident, the Association will pay in lieu of all other indemnity:

For Loss of Life \$4,000.00

MEMBER OF THE HARTFORD ACCIDENT ASSOCIATION

Monthly
Benefits

\$100.00

Maximum
Monthly Benefits

\$200.00

CHARTER

(Herein called Association)
DOES HEREBY INSURE

Death Benefit
Without Increase

\$2,000

Maximum
Death Benefit

\$4,000

INSURING
CLAUSE

WILLIAM R. LYON

(Herein called the Insured)

of City of ROGERS

State of

ARKANSAS.

against loss of life, limb, sight, or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

PART A.

SPECIFIC LOSSES

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life. \$2,000.00
For Loss of Both Eyes. 2,000.00
For Loss of Both Hands. 2,000.00
For Loss of Both Feet. 2,000.00

For Loss of One Hand and One Foot. \$2,000.00
For Loss of Either Hand. 750.00
For Loss of Either Foot. 750.00
For Loss of Either Eye. 500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irreparable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

PART B.

DOUBLE REGULAR DEATH BENEFIT

If the Insured sustains injuries as described in the Insuring Clause, while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in the death of the Insured within thirteen weeks from the date of the accident, the Association will pay in lieu of all other indemnity:

For Loss of Life. \$4,000.00

PART C. ANNUAL INCREASE TWO HUNDRED DOLLARS PER YEAR

After the first year's premium has been paid each year's renewal of this policy shall add Two Hundred Dollars to the death benefit until the same amounts to Four Thousand (\$4,000.00) Dollars.

\$4,000.00 TWENTY YEAR PRIVILEGE

When twenty full annual premiums have been paid, the death benefit of \$4,000.00, as herein provided, may be continued in force thereafter at a yearly cost of \$4.00 without a medical examination.

WAIVER OF PREMIUM

In case of permanent total disability of the Insured, due to accidental injury or sickness, there will be no further premiums payable on this policy, but the Insured will continue to draw full benefits as provided in the policy.

Date 1914

PART D. TOTAL ACCIDENT DISABILITY ONE HUNDRED DOLLARS PER MONTH FOR LIFE

If such injuries as described in the Insuring Clause, shall wholly and continuously disable the Insured for one day or more, and so long as the Insured lives and suffers said total loss of time, the Association will pay a monthly indemnity at the rate of One Hundred (\$100.00) Dollars.

PART E. PARTIAL ACCIDENT DISABILITY FORTY DOLLARS PER MONTH

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, or for like continuous disability following total loss of time, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Forty (\$40.00) Dollars.

PART F. DOUBLE INDEMNITY TWO HUNDRED DOLLARS PER MONTH FOR LIFE

If the Insured sustains injuries while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

PART G. MEDICAL ATTENDANCE TWENTY-FOUR DOLLARS

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, not exceeding Twenty-Four (\$24.00) Dollars.

PART H. FINANCIAL AID TWO HUNDRED DOLLARS

If such injuries render the Insured physically unable to communicate with friends, the Association will upon receipt of a message giving this Policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses necessary to put the Insured in communication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities

PART I. CONFINING ILLNESS ONE HUNDRED DOLLARS PER MONTH FOR LIFE

The Association will pay, for one day or more, at the rate of One Hundred (\$100.00) Dollars per month for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

PART J. NON-CONFINING ILLNESS FIFTY DOLLARS PER MONTH

The Association will pay, for one day or more, at the rate of Fifty (\$50.00) Dollars per month, but not exceeding one month for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART K. TWO HUNDRED DOLLARS PER MONTH WHILE IN HOSPITAL

If the Insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding One Hundred (\$100.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty

PART H.**FINANCIAL AID TWO HUNDRED DOLLARS**

If such injuries render the insured physically unable to communicate with friends, the Association will upon receipt of a message giving this Policy number, immediately transmit to the relatives or friends of the insured any information respecting him, and will defray all expenses necessary to put the insured in communication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities**PART I.****CONFIRMING ILLNESS ONE HUNDRED DOLLARS PER MONTH FOR LIFE**

The Association will pay, for one day or more, at the rate of One Hundred (\$100.00) Dollars per month for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the insured continuously within doors and requires regular visits therein by legally qualified physicians; provided said disease necessitates total disability and total loss of time.

PART J.**NON-CONFIRMING ILLNESS FIFTY DOLLARS PER MONTH**

The Association will pay, for one day or more, at the rate of Fifty (\$50.00) Dollars per month, but not exceeding one month for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART K.**TWO HUNDRED DOLLARS PER MONTH WHILE IN HOSPITAL**

If the insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for its actual hospital expenses, but not exceeding One Hundred (\$100.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

Standard Provisions

1. This policy includes the endorsements and attached pages, if any, and contains the entire contract of insurance. No request shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.
2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.
3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.
4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.
5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.
6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.
7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.
8. The Association shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.
9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.
10. Upon request of the insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.
11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.
12. If the insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.
13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.
14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Additional Provisions

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while engaged in military or naval service, or while the insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of or while participating in aerobatics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the insured, is a condition precedent to recovery, and any failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of ~~premium~~ (\$7.00) Dollars the first year, and the payment in advance of premiums of ~~premium~~ (\$7.00) Dollars annually or ~~premium~~ (\$1.75) Dollars quarterly thereafter, beginning with April 1st, 1927. is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The Annual Meeting of the Association will be held at ten o'clock A. M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 31 day of December 1926, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

Countersigned by

A. P. Arin
Treasurer.

A. Miller
President.

O. C. Balis
Policy Clerk.

COPY OF APPLICATION

1. What is your full name? William P. Lyon.
2. What is your age? 54 Date of birth? March J, 1872
Place of birth? Ky. (State)
Height? 5 feet 8 inches Weight? 170 Pounds
3. What is your residence address? R. F. D. #2, Box 6. Street
Town of Rogers State of Ark.
4. Whom do you name as beneficiary? Name Mrs. Zillian Lyon.
Address Same.
What is the relationship of the beneficiary to you? wife.
5. Are you member of firm or employee? Yes Name of firm? W. F. & S. R. R.
Nature of business? Railroads.
Location of firm? Wichita Falls. Street
Town of _____ State of Tex.
6. What is your occupation? Bridge and Building Foreman.

beginning with APRIL 1, 1927, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The Annual Meeting of the Association will be held at ten o'clock A.M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 31st day of December, 1926, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

A. A. Davis

Treasurer.

W. H. Miller

President.

Countersigned by

E. C. Balis

Policy Clerk.

COPY OF APPLICATION

1. What is your full name? William P. Lyon,
2. What is your age? 54 Date of birth? March 3, 1872
Place of birth? Ky. (State)
Height? 5 feet 8 inches. Weight? 170 Pounds
3. What is your residence address? R. F. D. #2, Box 6, Street
Town of Rogers State of Ark.
4. Whom do you name as beneficiary? { Name Mrs. Zillian Lyon,
Address Same.
What is the relationship of the beneficiary to you? wife.
5. Are you member of firm or employee? Yes Name of firm? W. F. & S. R. R.
Nature of business? Railroads.
Location of firm? Wichita Falls. Street
Town of Wichita Falls State of Tex.
6. What is your occupation? Bridge and Building Foreman.
7. What are all of your duties connected therewith? Supervising only.
8. What accident or health insurance do you carry? Give names of all companies or associations and amounts none

Have you any application for life, accident or health insurance pending? Answer as to each no

9. Has any application ever made by you for life, accident or health insurance been declined? Answer as to each no
 Has any life, health or accident policy issued to you been cancelled? Answer as to each no
 Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each no
 If so, give full particulars no
10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes no
11. Are you sound physically and mentally? Answer as to each YES. Are you maimed or deformed? Answer as to each no
 Have you any impairment of sight or hearing? Answer as to each no. Have you ever had a hernia? no
 Are your habits correct and temperate? yes
12. Have you ever had any of the following diseases: Rheumatism? no Tuberculosis? no Epilepsy? no
 Diabetes? no Heart Disease? no Any disease of the brain or nervous system? no
13. Have you received medical or surgical advice or treatment or had any local or constitutional disease within the past five years? Answer as to each no
 In no for no lasting no
 (Year) (Nature of Disease) (State Duration)
 In no for no lasting no
14. Have you ever been operated on by a physician or surgeon? no Date no
 For no Result no
15. Do your average weekly earnings equal or exceed the weekly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? yes
16. What is the form number of policy applied for? 60J What is the premium? \$ 16.00 quarterly
17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the Insured while in good health? yes
18. Do you hereby apply to the MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association? yes

Dated at Rogers Ark. this 27 day of December 1926.
 (Signature of applicant) William R. Lyon

Policy Form **60J**

DECEMBER 31, 1926.

DATED

WILLIAM R. LYON

ISSUED TO



IN THE

NO 60J-20343



SOUTHERN DIVISION OFFICE
 87-215 FALLS BUILDING
 MEMPHIS, TENN.

THIS POLICY PROVIDES
 BENEFITS FOR
 LOSS OF LIFE, LIMB, SIGHT OR
 TIME BY ACCIDENTAL MEANS,
 OR LOSS OF TIME BY
 SICKNESS AS HEREIN
 PROVIDED

Pd 2/1

14. Have you ever been operated on by a physician or surgeon? no Date
 For Result
15. Do your average weekly earnings equal or exceed the weekly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? YES
16. What is the form number of policy applied for? 60J What is the premium? \$ 16.00 quarterly
17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the Insured while in good health? YES
18. Do you hereby apply to the **MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION** for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association? yes

Dated at Bagara Ark. this 27 day of December 1926.
 (Signature of applicant) William R. Lyon

P48 1

**THIS POLICY PROVIDES
 BENEFITS FOR
 LOSS OF LIFE, LIMB, SIGHT OR
 TIME BY ACCIDENTAL MEANS,
 OR LOSS OF TIME BY
 SICKNESS AS HEREIN
 PROVIDED**

FROM
**SOUTHERN DIVISION OFFICE
 67 ONE FALLS BUILDING
 MEMPHIS, - - - TENN.**

NO 60J-20343

IN THE

ISSUED TO

WILLIAM R. LYON

DATED

DECEMBER 31, 1926.

Policy Form 60J

**\$200,000.00
 DEPOSITED WITH
 THE STATE OF
 NEBRASKA AS
 A PROTECTION
 TO ALL
 POLICYHOLDERS**

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION

[fol. 27] That Mr. Lyon and herself paid the agent \$74.00 in cash when the policy was taken out; that the next premium was paid on the 1st of March; that she paid a year in advance. The policy was taken out on December 31, 1936.

Plaintiff then identified a receipt from the Company, which is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 2

"Official Receipt for Dues

Rogers
Mar. 26
12 M
1927
Ark.

60J-20343

R-I

16.00

Mr. William R. Lyon,
R. F. D. 2, Box 6,
Rogers, Ark."

(Reverse side of Receipt)

"Mutual Benefit Health and Accident Association,
Omaha, 2nd Floor Baird Bldg.

(Thanks.)

This is an acknowledgment to the member to whom this card is addressed. File this receipt with your policy for future reference. Your address upon our records is the same as indicated upon the opposite side of this card. If you change your address or occupation notify the Association.

"The Mutual Benefit Health and Accident Ass'n in consideration of the payment of premium due, and subject to the provisions of policy held by Insured and the statements and answers in the application signed by the Insured, which the Insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve

o'clock, noon, standard time, July 1, 1927, at which time the next quarterly payment will be due.

Yours truly,

Countersigned this 25 day of March, 1927.

By J. T. Cottingham, Local Treasurer.

C. C. Criss, Treasurer."

[fol. 28] That she continued to pay quarterly premiums upon the policy, and never missed a payment; that the Company never objected to her paying the premium to Mr. Cottingham; that Mr. Cottingham was the local agent, but is dead. He lived at Rogers. Afterwards she made payments to Mr. Hamilton, agent at Rogers, and never did make a payment at Omaha, Nebraska. The Company never made any objection to her paying the premium to Mr. Hamilton. That she never had any trouble about the payment of quarterly premiums until the one she sent in July. She had an arrangement with Mr. Hamilton whereby she would always go down to his office and give him the money, and he would write out the receipt there, but oftentimes he would not be there, and she couldn't find him, and she would go to his house and hunt him up. Several times she was delayed in finding him. She would complain to Mr. Hamilton about him being out of his office when she would go down to pay him and that he said:

"Now, Mrs. Lyons, don't you worry about that. Anybody that I know is good for these payments, I make out the receipt on the first of the month, anyway, and then when you are down town sometime, and I am in the office or it is convenient, you can step in and pay me."

That she made them that way, paid them just any place she could catch him and at any time that it was convenient. That she received the money from her husband with which to pay the premium. That most of the time it would be the first of the month when the money would come and that she would always take it and pay Mr. Hamilton. That she was delayed, and in answer to the question, "The question is, were you delayed and made your payment after the first of the month?" she answered, "Yes, sir, several times."

"Mr. Pryor: We object to that testimony.

"The Court: Objection overruled. You may have your exception.

"Mr. Pryor: Note my exception."

(It was admitted that Mr. Hamilton was the local treasurer.)

That the Company never objected to her making payments to Mr. Hamilton. She identified — and the following receipts were introduced in evidence, all of which were identical with or similar to the receipt heretofore introduced, with the exception of the date that it was countersigned and the date to which said premium carried the policy in force.

[fol. 29] **PLAINTIFF'S EXHIBIT No. 3**

A receipt not postmarked, provided:

"Does hereby continue in force the said policy from date hereof until twelve o'clock, noon, standard time, April 1, 1928, at which time the next quarterly payment will be due."

Countersigned the 3rd day of January, 1928.

By Roy E. Hamilton, Local Treasurer.

Witness stated that the next receipt was for the first premium that she sent to Little Rock. Plaintiff's Exhibit No. 4, postmarked Little Rock, March 30, 9:30 P. M., 1934, Ark., reads in part:

PLAINTIFF'S EXHIBIT 4

"Official receipt for premium due April 1, 1934
Payment of this premium receipted for, if made on or before the date to which premiums have already been paid, keeps your policy in continuous effect, and if made after that date reinstates the policy from date of this receipt, as provided in policy, until twelve o'clock, noon, standard time, July 1, 1934, at which time another premium will be due."

Countersigned March 30, 1934.

By Harold R. Parker, Local Treasurer.

That she sent this premium to Little Rock after she had gone down to Mr. Hamilton's office to make her payment and he wasn't in his office. He was out at the [single] mill at Pea Ridge, and there was a girl in the office. She presumed the girl was about fourteen or fifteen years old. She told the girl that she wanted to pay the insurance premium and that the girl told her, "You will have to send that to Little Rock." That the girl got a little piece of paper and wrote down the address at Little Rock. That she bought a money order, addressed the envelope to Harold Parker, Little Rock, and mailed it, and the girl didn't say one word about Mr. Hamilton being discharged or why it was necessary for her to send the payment to Little Rock. She just took it for granted that Mr. Hamilton was out of town and that the girl was not allowed to give a receipt. That she received no notice that the Company had changed its method of collecting premiums. [fol. 30] That the circumstances surrounding the next "quarterly payment" were as follows: That she went down the first of July to make the next payment, and there was nobody in Hamilton's office, it was closed up. That she looked around a day or two and couldn't find Mr. Hamilton, and went down to his house where he used to live, and he had moved. That she could not find out where he was for a day or two, and finally located him, and went over to his house the second time before she caught him at home. That it was two or three or four days late then. The next morning she went down to his office early, about seven o'clock, and he was just getting in his car in front of his office, and she called to him to wait, that she wanted him to take her insurance money and that he said, "I can't take that, I can't take that," and she said, "Well, why can't you take it?" and he said, "Well, you will have to send that to Little Rock." That he didn't tell her where to send it in Little Rock, but asked her, "Didn't you get a notice from the Company?" and she said, "No, I haven't had any notice from the Company," and he said, "Well, they should have sent you one." That she went back home, and waited for the mail carrier that morning and thought perhaps she would get the notice, but didn't, so that afternoon she went down to the post office and addressed the envelope just to the Company at Little Rock, and bought a money order, and sent it. That the day after she mailed the money order she drove over to Oklahoma City, and was

gone from home two or three days, and when she got back home a letter was there, and they had sent the money order back. She identified the money order, and it was introduced in evidence.

Plaintiff's Exhibit No. 5 was a United States postal money order for \$16.00, dated July 6, 1934, the face of which reads as follows:

PLAINTIFF'S EXHIBIT 5

"74300	Rogers, Ark.	294252
Office Number		Serial number
United States Postal Money Order		Dollars #
Identification required		16
		cents

July - 6 - 34

Postmaster at

Little Rock, Ark.

Postal
Money
Order

Pay amount stated above to order of payee named in attached coupon. Not good for more than largest amount [fol. 31] indicated on left hand margin. Any alteration or erasure renders this order void.

Paying office

L. Loyd Patterson, Postmaster.

Received Payment:

Stamp here

Rogers, Ark.

74300
Office Number

294252
Serial Number

Coupon for Paying Office
Holder Must Not Detach

Sixteen	Dollars	#	Cents
Write Words for Dollars		Figures for Cents	

Pay To:

Mutual Benefit

Remitter:

Health & Accident Association
William R. Lyon

Issuing Office

Rogers, Ark.

C. O. D. Jul. 6
Parcel Number 1934"

Stamp Here

The letter returning the money order is as follows:

PLAINTIFF'S EXHIBIT NUMBER 6

"C. C. Criss, President-Treasurer. F. W. Engler, Vice-President.

Mutual Benefit Health and Accident Association,
Omaha

July 13, 1934.

"Mr. William B. Lyon, R. F. D. 2, Box 9, Rogers, Arkansas.

"DEAR MR. LYON:

You will find inclosed the money order in the amount of \$16.00, which you sent us to reinstate your policy #60J-20343, and we regret that it will not be possible for [fol. 32] us to accept this payment, as the Home Office did not send us an official receipt for you.

We note that you are past the age of sixty years, but we are today writing our Home Office, and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement. This endorsement will mean that you will not be paid any benefits during the first thirty days of any period of disability, but should you be disabled over a long period of time, you would have the same protection as you previously had, starting on the 31st day.

Just as soon as we receive a reply from our Home Office, we will write you, and we are enclosing a self-addressed envelope for your convenience in advising us if you would desire to keep your policy in force with the endorsement attached.

Very truly yours, Mutual Benefit Health and Accident Ass'n, Harold R. Parker, General Manager."

HRP/ch.

That she received another letter concerning this, which was introduced in evidence.

PLAINTIFF'S EXHIBIT NUMBER 7

"C. C. Crise, President-Treasurer. F. W. Engler, Vice-President.

**Mutual Benefit Health and Accident Association,
Omaha**

July 26, 1934.

**"Mr. William R. Lyon, R. F. D. #2, Box 9, Rogers,
Arkansas.**

DEAR MR. LYON:

We have just received a letter from our Home Office in which they state that they will make an exception in your [fol. 33] case and if you will accept a thirty-day elimination on your policy and remove the non-confining rider No. 1, that they will allow you to reinstate your policy.

The thirty day elimination endorsement will mean that you will not be entitled to any benefits during the first thirty days of any period of disability due to sickness or accident, and your benefits will start on the thirty-first day, although your policy will allow you same lifetime coverage as heretofore, and there will be no increase in the premium rates.

This is certainly an unusual exception on the part of our Home Office and if you desire to accept same, kindly sign both copies of the enclosed thirty day elimination endorsement and return the original signed endorsement to us together with the non-confining rider No. 1 which is attached to your policy and your check for a regular quarterly premium.

You will find the endorsement is pasted in your policy and this is the rider you should tear out and send to us or if you do not understand what we mean, you can send us both signed copies of the endorsement which we are enclosing together with your policy, and your quarterly premium, waiting your reply.

**Very truly yours, Mutual Benefit Health & Accident
Ass'n, Harold R. Parker, General Manager"**

"Endorsement

"To become attached to and form a part of Policy No. 60J-29343.

It is understood and agreed that no monthly indemnity shall be payable for the first 30 days of any period of disability caused by either sickness or accident, covered by the above policy.

Any provision in said policy inconsistent with this agreement is hereby modified to agree therewith. Otherwise said policy to remain as originally written.

I fully understand and agree to the foregoing.

(Sign Here) — — —, Insured Policy Holder.

Witness: — — —.

Mutual Benefit Health & Accident Association.

[fol. 34] Dated, approved and countersigned at Little Rock, this 26 day of July, 1934.

By — — —, Policy Clerk.

That she had never received any previous notice of any change of the Company's place of handling business. Plaintiff then identified and it was admitted in evidence a letter (Plaintiff's Exhibit No. 8) from C. C. Criss, Treasurer, addressed. "Dear Policy Holder," in which it was stated:

PLAINTIFF'S EXHIBIT 8

"H. S. Weller, President.

Mutual Benefit Health and Accident Association,

Omaha

October 18, 1929.

"DEAR POLICY HOLDER:

During this year, your Association will pay benefits to its policy holders amounting to \$7,500,000.00. In order to handle this vast amount of business and to give all policy holders the very best possible service, it has been decided to establish a Company Branch Office at Memphis, Tennessee.

The Branch Office at Memphis will have a staff of fifteen people, most of whom have been sent from the Home Office

to handle matters pertaining to our business and to give you good service in the handling of any matters pertaining to your insurance.

All claims will be paid through the Memphis Office, so you should notify them in case you are disabled. You should also take up with them any other matters pertaining to your protection with us.

We need a good, capable person in your territory to sell our insurance, and would appreciate it very much if you would give us the name of someone who might be interested in taking up the work for us. A salesman who has been selling books, hosiery, medicine, etc., can make a good income from selling our protection. You would be doing such a party a favor by forwarding his name, in the space provided below, using the enclosed envelope, which does not require any postage.

[fol. 35] Trusting you are well pleased with your policy and that you will continue to recommend us to your many friends, we are

Yours very truly, Mutual Benefit Health & Accident
Ass'n, C. C. Criss, Treasurer.

Name: _____

Address: _____

"The Court: Now what is the objection?

"Mr. Pryor: It could have no possible bearing on the issue in this case. It is a notification there of a change in place—the establishment of a branch office over in Memphis in 1929.

"The Court: The only purpose that I can see that would save—you may introduce that paragraph of it and read that to the Jury, if you desire. That is all. You may have your exceptions to the Court's ruling.

"Mr. Nance: I may state the purpose of it is to show that they had abandoned the requirement to deal with the Omaha Ede.

"Mr. Pryor: I would like to state at this time, to expedite the trial of this case; we are not insisting at all that the premiums, or any of them, had to be paid at Omaha after the establishment of the local treasurer at Rogers.

"The Court: I think perhaps that testimony is all in anyway—don't make much difference whether it is permitted or not.

"Mr. Nance: I offer in evidence a letter from the defendant company, dated September 17, 1934, and signed Alvin Laser."

It was received in evidence as Plaintiff's Exhibit No. 9, and is as follows:

[fol. 36]

PLAINTIFF'S EXHIBIT 9

"Mutual Benefit Health and Accident Association,

Omaha

September 17, 1934.

"Mr. J. W. Nance, Attorney, Rogers, Arkansas.

In Re William B. Lyon, Deceased

DEAR MR. NANCE:

I received your letter of August 31 with death proof attached in connection with claim filed by Mrs. Zillah Lyon, beneficiary of the above named.

I was in Rogers to see you about this claim on Saturday, September 8, but was advised that you had left that same morning for the Rio Grande Valley. I was very sorry to have missed you, as I was anxious to thoroughly discuss this claim with you.

I have made a very careful investigation of all of the facts surrounding this case, and I regret to advise that it would not be possible for this claim to be approved for payment. A careful check of our records discloses that this policy lapsed for non-payment of premium due July 1, and the reinstatement tendered on July 6 was refused, and according to the provisions of the policy held by Mr. Lyon, the Association was clearly within its rights in refusing this premium.

The writer will be in Fort Smith, Arkansas, at the Ward Hotel tomorrow, Wednesday, and Thursday. If you care to discuss this case personally, and will so advise me, I will be glad to come to Rogers to see you.

With kindest regards, I am

Very truly yours, Mutual Benefit Health & Accident Ass'n. Alvin Laser, Claim Auditor."

AL:CH.

That when she received the letter with the return of the money order she was away on a visit to Oklahoma City, was gone about three days. That she had only been home in Rogers about three-quarters of an hour when she learned that Mr. Lyon had lost his life, and had not seen the letter [fol. 37] when she received that information, and the letter had not reached Mr. Lyon. That when the letter dated July 26 was received it was after Mr. Lyon's death. He died on the 19th.

The following receipts for premiums were identified by plaintiff and admitted in evidence, being in words and figures identical with or similar to the receipt set out in full heretofore, with the exception of the date received and the time for which it continued the policy in force, each being for \$16.00.

PLAINTIFF'S EXHIBIT No. 10

reads in part as follows:

"* * * does hereby continue in force the said policy from date hereof until twelve o'clock, noon, standard time, Dec. 31, 1927, at which time the next quarterly payment will be due."

Countersigned the 30th day of Sept., 1927, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 11

reads in part as follows:

"Official Receipt for Premium Due April 1, 1928

"* * * Payment of this premium receipted for, if made on or before date due keeps your policy in continuous effect, and if made after date due reinstates the policy on date of this receipt as provided in policy, until 12 o'clock, noon, standard time, June 30, 1928, at which time another payment will be due."

Countersigned the 31st day of March, 1928, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 12

reads in part as follows:

"Official Receipt for Premium Due July 1, 1928

"* * * Payment of this premium receipted for, if made on or before date due keeps your policy in continuous effect, and if made after date due reinstates the policy on date of this receipt as provided in policy, until 12 o'clock, noon, standard time, October 1, 1928, at which time another payment will be due."

Countersigned the 30th day of June, 1928, by Local Treasurer.

[fol. 38]

PLAINTIFF'S EXHIBIT No. 13

reads in part as follows:

"Official Receipt for Premium Due October 1, 1928

(Same as other receipt) "* * * until 12 o'clock noon, standard time, Dec. 31, 1928, at which time another premium will be due."

Countersigned the 29th day of September, 1928, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 14

reads in part as follows:

"Official Receipt for Premium Due December 31, 1928

(Same as other receipts) "* * * until 12 o'clock noon, standard time, April 1, 1929, at which time another premium will be due."

Countersigned the 29th day of December, 1928, by Local Treasurer, Roy E. Hamilton.

PLAINTIFF'S EXHIBIT No. 15

reads in part as follows:

"Official Receipt for Premium Due April 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, July 1st, 1929, at which time another premium will be due."

Countersigned the 30th day of March, 1929, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 16

reads in part as follows:

"Official Receipt for Premium Due July 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, October 1st, 1929, at which time another premium will be due."

Countersigned the 1st day of July, 1929, by Roy E. Hamilton, Local Treasurer.

[fol. 39] **PLAINTIFF'S EXHIBIT No. 17**

reads in part as follows:

"Official Receipt for Premium Due Oct. 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, December 31, 1929, at which time another premium will be due."

Countersigned the 1st day of Oct., 1929, by Roy E. Hamilton, Local Treasurer.

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PLAINTIFF'S EXHIBIT No. 18

reads in part as follows:

"Official Receipt for Premium Due April 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, July 1, 1930, at which time another premium will be due."

Countersigned the 31 day of March, 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 19

reads in part as follows:

"Official Receipt for Premium Due July 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, October 1, 1930, at which time another premium will be due."

Countersigned the 1st day of July, 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 20

reads in part as follows:

"Official Receipt for Premium Due Oct. 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, December 31, 1930, at which time another premium will be due."

Countersigned the 30th day of Sept., 1930, by Roy E. Hamilton, Local Treasurer.

[fol. 40] **PLAINTIFF'S EXHIBIT No. 21**

reads in part as follows:

"Official Receipt for Premium Due Dec. 31, 1930

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1931, at which time another premium will be due."

Countersigned the 31st day of Dec., 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 22

reads in part as follows:

"Official Receipt for Premium Due April 1, 1931

(Same as other receipts) "• • • until 12 o'clock noon, standard time, July 1, 1931, at which time another premium will be due."

Countersigned the 1st day of April, 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 23

reads in part as follows:

"Official Receipt for Premium Due July 1, 1931

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1931, at which time another premium will be due."

Countersigned the 1st day of July, 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 24

reads in part as follows:

"Official Receipt for Premium Due October 1, 1931

(Same as other receipt) " * * * until 12 o'clock noon, standard time, December 31, 1931, at which time another premium will be due."

Countersigned the 1st day of Oct., 1931, by Roy E. Hamilton, Local Treasurer.

[fol. 41]

PLAINTIFF'S EXHIBIT No. 25

reads in part as follows:

"Official Receipt for Premium Due December 31, 1931

(Same as other receipts) " * * * until 12 o'clock noon, standard time, April 1, 1932, at which time another premium will be due."

Countersigned the 31st day of Dec., 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 26

reads in part as follows:

"Official Receipt for Premium Due April 1, 1932

(Same as other receipts) " * * * until 12 o'clock noon, standard time, July 1, 1932, at which time another premium will be due."

Countersigned the 31st day of Mar., 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 27

reads in part as follows:

"Official Receipt for Premium Due July 1, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1932, at which time another premium will be due."

Countersigned the 7th day of July, 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 28

reads in part as follows:

"Official Receipt for Premium Due October 1, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, December 31, 1932, at which time another premium will be due."

Countersigned the 8th day of Oct., 1932, by Roy E. Hamilton, Local Treasurer.

[fol. 42]

PLAINTIFF'S EXHIBIT No. 29

reads in part as follows:

"Official Receipt for Premium Due December 31, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1933, at which time another premium will be due."

Countersigned the 30th day of Dec., 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 30

reads in part as follows:

"Official Receipt for Premium Due April 1, 1933

(Same as other receipts) "• • • until 12 o'clock noon, standard time, July 1, 1933, at which time another premium will be due."

Countersigned the 1st day of April, 1933, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 31

reads in part as follows:

"Official Receipt for Premium Due July 1, 1933

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1933, at which time another premium will be due."

Countersigned the 1st day of July, 1933, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 32

reads in part as follows:

● **"Official Receipt for Premium Due Oct. 1, 1933**

(Same as other receipts) "• • • until 12 o'clock noon, standard time, December 31, 1933, at which time another premium will be due."

Countersigned the 30th day of September, 1933, by Roy E. Hamilton, Local Treasurer.

[fol. 43] PLAINTIFF'S EXHIBIT No. 33

reads in part as follows:

"Official Receipt for Premium Due — —, —"

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1934, at which time another premium will be due."

Countersigned the 29th day of Dec., 1933, by Roy E. Hamilton, Local Treasurer.

RECITAL AS TO PREMIUM RECEIPTS, ETC.

That the foregoing receipts constitute all of the receipts for premiums paid except the one for the first quarter of 1929 and the one for the last quarter of 1927; that she never received those receipts, "there are two missing;" that she gave a check, which was introduced in evidence, payable to Roy E. Hamilton, and dated Dec. 31, 1927, in the amount of \$16.00. Another check was identified by her and introduced in evidence, dated Dec. 28, 1929, for \$16.00, payable to Roy E. Hamilton, both of which were in payment of the premiums for which she had no receipts.

Cross-examination:

That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead; that she paid a premium of \$74.00 for the first year but did not get a receipt for the same; that Mr. Cottingham said that the policy was a receipt. She made her next premium payment on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926. She stated in answer to the question:

"Q. Why was it, if you know, that you paid a quarterly premium on the first day of April, 1927, or just three months after you state that you had paid a premium for the entire year?

"A. Well, in order to keep my payments up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace."

ORDER ALLOWING APPEAL

Appeal allowed upon appellant furnishing supersedeas bond in compliance with law in the amount of \$4500.00.

Dated this 10th day of July, 1937.

By the Court:

Heartsill Ragon, Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 9, 1937

Now comes the defendant, Mutual Benefit Health & Accident Association, and files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the Eighth Circuit:

I

That said Court erred in overruling defendant's demurrer to the complaint of the plaintiff, over the objections and exceptions of the defendant.

II

That said Court erred in holding that the plaintiff in this action was entitled to have allowed and recover in these proceedings an attorney's fee, as provided by the statutes of the State of Arkansas, over the objections and exceptions of the defendant.

[fol. 50]

III

That the Court erred in overruling defendant's motion to strike the testimony of the plaintiff as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid seventy-four dollars at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court.

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant counsel. In the next place, the Court is of the opinion that

this question is raised, and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion would be overruled and you may have your exception.

“Mr. Pryor: As I understood the demurrer, if the Court please, at the time the Court overruled the demurrer, the Court’s action was based on allegation of the complaint ‘that said premium had been previously paid and, therefore, was not due and payable on said first day of July, and the insured was not liable for payment of same at said time;’ and that that was the only suggestion at that time which might be taken to have raised this issue.

“The Court: I don’t recall the exact wording, but I do know the allegation—there were three grounds of demurrer. The Court felt that the first ground of the demurrer, I don’t recall what it was now, was properly taken—properly set out. He was doubtful about the second, but the third was based on the question of the efficiency of the allegations of the complaint, and when the Court read the complaint, he was convinced that he did allege that the premium had been paid. So on that ground the third ground, the Court overruled the demurrer.

“Mr. Pryor: As I remember it, though, there was no suggestion by Mr. Nance at that time that the premium had been paid a year in advance at that time the policy was taken out—no statement of that sort made.

“The Court: Mr. Nance started to develop that point, and the Court stopped him and called upon you to give your [fol. 51] opinion about the matter, which you rather frankly did. So the discussion of the matter was rather brief. Have you any further motion?

“Mr. Pryor: Save our exception.

“The Court: Your exception will be noted.

IV

That the court erred in overruling the defendant’s motion for a continuance as follows:

“Mr. Pryor: The defendant, at this time, moves that this cause be continued on the ground of surprise; that the alle-

"Mr. Pryor: As I remember it, though, there was no suggestion by Mr. Nance at that time that the premium had been paid a year in advance at the time the policy was taken out—no statement of that sort made.

"The Court: Mr. Nance started to develop that point, and the Court stopped him and called upon you to give your opinion about the matter, which you rather frankly did. So the discussion of the matter was rather brief. Have you any further motion?

"Mr. Pryor: Save our exception.

"The Court: Your exception will be noted.

MOTION FOR CONTINUANCE

"Mr. Pryor: The defendant, at this time, moves that this cause be continued on the ground of surprise; that the allegations of the complaint do not allege that the policy was kept in force for a year in advance; and on the ground that [fol. 46] the rest of the complaint pleaded an excuse for failure to pay the premium; and that if a continuance is granted, the defendant will be able to make proof to the effect that the seventy-four dollars was not paid or received by the company at the time the policy was issued; and that the defendant in this case had no intimation from the plaintiff or her counsel before this trial that such a contention would be made; and we offer to show by witnesses at this time that no such intimation was ever made and that it was never suggested by Mr. Nance at any time prior to this trial that such a contention would be made at the trial of this case.

"The Court: Well, now, where are your witnesses that you want to prove all of that by?

"Mr. Pryor: We have Mr. Laser and myself.

"The Court: I don't think it makes a bit of difference. I don't think it would be admissible—doubtful if it would be material whether or not he had ever made this statement to you or not, and you are both here ready to testify.

"Mr. Pryor: I don't understand, your Honor.

"The Court: That wouldn't be any ground for a continuance because you gentlemen are here.

"Mr. Pryor: I mean to testify that we never had noticed that such a contention would be made here so that we could have prepared ourselves by obtaining evidence from the home office of the defendant.

"The Court: What would that evidence be?

"Mr. Pryor: The evidence would be that it never received a seventy-four dollar payment when this policy was applied for and issued, and that it only received quarterly premiums from the very beginning, and that it received twenty-six dollars at the time the policy was issued and sixteen dollars quarterly thereafter up to April 1, 1934.

"The Court: The agent who wrote the policy, as I understand it, is dead—the one she claims she paid the money to?

"Mr. Pryor: Yes, sir.

"The Court: The only thing you could do would be to offer testimony here that it was never received at your office.

"Mr. Pryor: Yes, sir.

"The Court: Your motion will be overruled, and you may save your exceptions.

[fol. 47] DEFENDANT'S MOTION FOR INSTRUCTED VERDICT

"Mr. Pryor: Note our exceptions. If the Court please, then the defendant does not desire to put on any evidence, but moves for an instructed verdict on the following grounds: that the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred.

"The Court: Your motion will be overruled.

"Mr. Pryor: Note our exceptions.

INSTRUCTION TO JURY

"The Court: Gentlemen of the Jury, the Court is going to direct you to find the issue in favor of the plaintiff in the sum of \$3678.00.

"Mr. Pryor: Note our exception.

"The Court: All right."

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL FOR DEFENDANT

The foregoing bill of exceptions contains all of the material evidence offered and received on the trial of said cause, including all rulings made during the course of the trial, which were excepted to by the defendant and exceptions allowed by the court.

Pryor & Pryor, Attorneys for Mutual Benefit Health & Accident Association and Appellant

STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between John W. Nance, attorney for the plaintiff, and Pryor and Pryor, attorneys for the defendant, that the proposed bill of exceptions presented herewith, consisting of pages numbered 1 to 21, inclusive, contains a true statement of the proceedings had upon the trial of the cause and contains all of the material evidence produced at the trial of the said cause.

John W. Nance, Attorney for Plaintiff, Pryor & Pryor,
by Thos. B. Pryor, Jr., Attorneys for Defendant.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The parties to the above entitled action, through their respective counsel of record, having stipulated in writing that the proposed bill of exceptions presented herewith, consisting of pages numbered 1 to 21 inclusive, contains a true statement of the proceedings had upon the trial of the cause and contains all the material evidence produced at the trial of said cause, and the same having been duly considered by the Judge of this Court who presided at the trial of said cause, and the same appearing to be in all respects proper, I, the undersigned, United States District Judge who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions contains all of the material facts and matters, things, proceedings, objections, rulings and exceptions thereto occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the trial; and I further cer-

tify that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions constitute all the exhibits offered in evidence at the said trial, and I hereby make all of said exhibits a part of the foregoing bill of exceptions; and I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this case, and order the same filed as a part of the record herein, and further order the Clerk of this Court to attach to the said bill of exceptions all of the said exhibits not set forth therein and to transmit said entire bill of exceptions, including all exhibits whatsoever to the Circuit Court of Appeals for the Eighth Circuit.

This July 12, 1937.

Heartsill Ragon, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted.]

PETITION FOR APPEAL—Filed July 9, 1937

To the Honorable Heartsill Ragon, Judge of the District Court Aforesaid:

The above named, Mutual Benefit Health & Accident Association, feeling aggrieved by the verdict of the jury and judgment entered thereon, in the above entitled action on the — day of June, 1937, hereby appeals from said verdict and judgment to the United States Circuit Court of Appeals [fol. 49] for the Eighth Circuit; that the errors upon which such appeal is based are contained in the assignment of errors filed herewith; that petitioner prays that his appeal be allowed and that a citation be issued in accordance with law; and that an authenticated transcript of the record, proceedings, and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

And your petitioner further prays that an order be made, fixing the amount of security to be given by appellant conditioned as provided by law, and that execution of the judgment be superseded until final determination of said appeal.

Dated this 9th day of July, 1937.

Pryor & Pryor, by Thos. B. Pryor, Jr., Attorneys for Appellant.

That the payment was made with the application.

"Q. You know the policy was delivered to you after he signed the application and it was sent in, do you not?"

"A. Why, yes."

"Q. And then you state that you paid to this man that is since dead seventy-four dollars in cash, taking no receipt [fol. 44] or no memoranda of any kind whatever acknowledging receipt by him of the seventy-four dollars?"

"A. No, he didn't take the money when he first made out the policy. If I remember right, he sent the policy into the company after he made it out."

"Q. You mean he sent the application into the company?"

"A. Yes, sent the application in."

"Q. Then the company afterwards forwarded the policy to you?"

"A. Yes."

That she has lived in Rogers for nineteen years; that her husband was working in Texas; been there twenty-four years; spent the most of his time down there, and she was living at Rogers; that she handled the payment of these premiums as his agent; that she signed her husband's name to checks that were issued in payment of the premiums; that she made the premium payment due April 1, 1934, before the first of April, and the receipt is dated March 30, 1934, at Little Rock, Arkansas; that she had not received written notice that she was to make her payments at the Little Rock office, and stated in answer to the question:

"Q. You knew that you had received a receipt for the premium that had been made for the April 1 payment, did you not?"

"A. Yes, sir."

"Q. By sending to Little Rock. Why didn't you mail this premium to Little Rock?"

"A. Well, because it had been customary for me to pay Mr. Hamilton, and I thought he was the one I should pay to when he was there."

In response to the offer on her part to pay the premium by money order on the 6th day of July to the Little Rock office she received a letter dated July 13, 1934, from Harold R. Parker, General Manager, at Little Rock; that she received this letter the same day that she learned of her husband's

accident; that she received no notice that this premium was due.

"Mr. Nance: We rest.

MOTION TO STRIKE

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid seventy-four dollars at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court.

[fol. 45] "The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant counsel. In the next place, the Court is of the opinion that this question is raised, and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion would be overruled and you may have your exception.

"Mr. Pryor: As I understood the demurrer, if the Court please, at the time the Court overruled the demurrer, the Court's action was based on allegation of the complaint 'that said premium had been previously paid and, therefore, was not due and payable on said first day of July, and the insured was not liable for payment of same at said time;' and that that was the only suggestion at that time which might be taken to have raised this issue.

"The Court: I don't recall the exact wording, but I do know the allegation—there were three grounds of demurrer. The Court felt that the first ground of the demurrer, I don't recall what it was now, was properly taken—properly set out. He was doubtful about the second, but the third was based on the question of the efficiency of the allegations of the complaint, and when the Court read the complaint, he was convinced that he did allege that the premium had been paid. So on that ground, the third ground, the Court overruled the demurrer.

gations of the complaint do not allege that the policy was kept in force for a year in advance; and on the ground that the rest of the complaint pleaded an excuse for failure to pay the premium; and that if a continuance is granted, the defendant will be able to make proof to the effect that the seventy-four dollars was not paid or received by the company at the time the policy was issued; and that the defendant in this case had no intimation from the plaintiff or her counsel before this trial that such a contention would be made; and we offer to show by witnesses at this time that no such intimation was ever made and that it was never suggested by Mr. Nance at any time prior to this trial that such a contention would be made at the trial of this case.

"The Court: Well, now, where are your witnesses that you want to prove all of that by?

"Mr. Pryor: We have Mr. Nance and myself.

"The Court: I don't think it makes a bit of difference. I don't think it would be admissible—doubtful if it would be material whether or not he had ever made this statement to you or not, and you are both here ready to testify.

"Mr. Pryor: I didn't understand, your Honor.

"The Court: That wouldn't be any ground for a continuance because you gentlemen are here.

"Mr. Pryor: I mean to testify that we never had notice that such a contention would be made here so that we could have prepared ourselves by obtaining evidence from the home office of the defendant.

"The Court: What would that evidence be?

"Mr. Pryor: The evidence would be that it never received a seventy-four dollar payment when this policy was applied for and issued, and that it only received quarterly premiums [fol. 52] from the very beginning, and that it received twenty-six dollars at the time the policy was issued and sixteen dollars quarterly thereafter up to April 1, 1934.

"The Court: The agent who wrote the policy, as I understand it, is dead—the one she claims she paid the money to.

"Mr. Pryor: Yes, sir.

"The Court: The only thing you could do would be to offer testimony here that it was never received at your office.

"Mr. Pryor: Yes, sir.

"The Court: Your motion will be overruled, and you may save your exceptions.

"Mr. Pryor: Note our exceptions."

V

That the court erred in overruling the defendant's motion for an instructed verdict as follows:

"Mr. Pryor: If the Court please, then the defendant does not desire to put on any evidence, but moves for an instructed verdict on the following grounds: that the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred.

"The Court: Your motion will be overruled.

"Mr. Pryor: Note our exceptions."

VI

That the court erred in instructing the jury to return a verdict for the plaintiff as follows:

"The Court: Gentlemen of the Jury, the Court is going to direct you to find the issue in favor of the plaintiff in the sum of \$3678.00.

"Mr. Pryor: Note our exception.

"The Court: All right."

VII

That the Court erred in entering judgment on the verdict, as there is no substantial evidence to sustain the verdict.

[fol. 53]

VIII

That the Court erred in directing a verdict for the plaintiff as the plaintiff's evidence regarding the \$74.00 payment cannot be said to be conclusive.

IX

That the verdict and judgment are contrary to law.

Wherefore, the defendant, Mutual Benefit Health & Accident Association, and appellant prays that the judgment in said cause be reversed and the cause remanded with instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Pryor & Pryor, by Thos. B. Pryor, Jr., Attorneys
for Appellant,

Supersedeas bond on appeal for \$4,500.00, approved and filed July 10, 1937, omitted in printing.

[fol. 54] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT ON APPEAL—
Filed July 20, 1937

It is hereby stipulated and agreed by and between John W. Nance, attorney for the plaintiff, and Pryor & Pryor, attorneys for the defendant, that the following be incorporated in the transcript of record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause:

1. Transcript of removal.
2. Defendant's answer.
3. First amended complaint.
4. Demurrer to amended complaint.
5. Order overruling demurrer. Defendant's exception.
6. Answer to first amended complaint.
7. Verdict of the jury.
8. Order allowing \$250.00 for plaintiff's attorney's fee. Defendant's exception.
9. Order denying plaintiff's application for assessment of penalty. Plaintiff's exception.
10. Judgment.
11. Defendant's notice of appeal in open court.
- [fol. 55] 12. Order allowing defendant ninety days within which to file bill of exceptions.

13. Order staying execution.
14. Bill of exceptions and order settling same.
15. Petition for appeal.
16. Assignment of errors.
17. Order allowing appeal.
18. Supersedeas bond with approval thereon.
19. Citation with admission of service.
20. Stipulation for transcript of record on appeal.
21. Clerk's certificate.

Dated this 18th day of July, 1937.

Pryor & Pryor, Attorneys for Appellant. John W.
Nance, Attorney for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] Appearances of counsel omitted in printing.

[fol. 57] Order of submission, December 6, 1937, omitted in printing.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, MARCH TERM, A. D. 1938

No. 10,982

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

vs.

MRS. ZILLAH LYON, Appellee

Appeal from the District Court of the United States for the
Western District of Arkansas

Mr. G. Byron Dobbs (Mr. Thomas B. Pryor and Mr.
Thomas B. Pryor, Jr., were on the brief) for appellant.

Mr. John W. Nance filed brief for appellee.

Before Stone, Gardner and Woodrough, Circuit Judges

OPINION—March 19, 1938

Woodrough, Circuit Judge, delivered the opinion of the court:

This appeal is to reverse a judgment for plaintiff in a suit upon an insurance policy.

It appears that on December 31, 1926, the Mutual Benefit Health and Accident Insurance Association issued its policy insuring the plaintiff's husband, William R. Lyon, against accidental death (and other hazards, including sickness) in pursuance to an application in writing signed by him and [fol. 59] made part of the insurance contract. The application was in question and answer form, and in response to the question, "What is the premium?", the answer was "\$16.00 quarterly." It appears that premium payments of \$16.00 were made each and every quarter after the issuance of the policy up to and including April 1st, 1934, and it is not disputed that the insurance was thereby kept in force until July 1, 1934. But no further payment of premium was made on or before said first day of July, 1934. Mr. Lyon suffered death from bodily injuries sustained through purely accidental means within the meaning of the policy on July 12, 1934, and the association having refused payment after proof of loss, the widow, who is the beneficiary in the policy, brought this action at law, praying recovery upon the policy for the total amount therein provided for accidental death, increased as specified in the policy because it had been continued in force seven years. The jurisdictional amount was involved and diversity of citizenship existed.

It was alleged in the amended complaint upon which the case was tried that the insured had paid all premiums and had fully performed the conditions and requirements of the policy, and that it was in full force and effect at the time of the accidental death of the insured, and there were further allegations as follows:

"By the terms of provision 'C' aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the City of Rogers,

Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from the insured at any time it was most convenient for the insured to make such payments, and the defendant thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

[fol. 60] "That on and prior to the first day of January, 1934, one Roy E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the city of Rogers, Arkansas, duly authorized to collect premiums from the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said city of Rogers and purchased a postal money order for the sum of \$16.00, made payable to the defendant, and [deposited]

same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

"First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

[fol. 61] "Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy had waived its right to declare a forfeiture for non-payment of said premium on said first day of July.

"Third. That said premium had been previously paid and therefore was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

"That it is provided in part (C) of said policy of insurance as follows, to-wit:

"After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00."

"That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including the year 1933, making six annual renewals, which entitled the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1200.00.

"That in a rider attached to said policy it is provided as follows:

"In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition

to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured.' "

"That the insured paid all premiums due thereon in the sum of \$464.00, and an additional sum of \$48.00; that under said clause plaintiff is entitled to recover the sum of \$478.00, including interest at the rate of 4% annually.

"That the plaintiff is entitled to recover of and from the defendant company benefits in the total sum of \$3678.00."

[fol. 62] A true copy of the policy sued on was attached to the amended complaint.

The answer of the association contained specific denials but admitted the execution and delivery of the policy and that the insured lost his life from accidental causes on July 19th, 1934. It was alleged that the first day of July, 1934, was the last day to which premium had been paid in advance and that the policy expired by its own terms on that date, and that under the provisions of the insurance contract the association had the right to refuse to extend the insurance for any period of time beyond the period for which the premium had been paid in advance, and that it did refuse to insure for any additional period of time beyond the first day of July, 1934. The association "denies that the defendant by its acts and conduct established a custom of receiving payments of premiums out of time; denies that it changed the method of payment from that provided in the policy, and denies that it waived its right to declare a forfeiture for the nonpayment of said premium on the 1st day of July, and specifically denies that said premium had been previously paid and, therefore, was not due and payable on said 1st day of July."

It was further pleaded that the following provisions of the policy presented a bar to recovery by the plaintiff:

"The term of this policy begins at twelve o'clock noon, standard time, on date of issue . . . and ends at twelve o'clock noon on date renewal is due."

" . . . The acceptance of any premium on this policy shall be optional with the Association, . . . "

On the trial of the case the plaintiff testified that she was present with her husband when the insurance was obtained

and a liberal interpretation of part of her testimony made by her counsel was:

"During the negotiations with the local agent, in which both insured and the plaintiff participated, it was discovered that the premiums were to be paid upon a specific date and that no days of grace were allowed; that if premiums were not paid on the date specified, the policy would lapse and [fol. 63] insured would forfeit the insurance. They objected to that feature for the reason stated, that there might be times when insured would be out of employment and consequently be unable to meet premium payments on time. To obviate this objection, the agent recommended that they pay a full year's premium in advance and then go on with quarterly premiums in the regular way, and by that means insured would always have his premiums paid-up far enough in advance to bridge him over any unforeseen inability to pay on time, and thus the insured was induced to pay the first year's premium in advance and he elected to pay subsequent annual premiums in quarterly installments, beginning on the first day of April, 1927, which was expiration date of the first quarter after the policy was issued. The payment of the first year's premium in the sum of \$74.00 was made to the agent and the policy was thereupon delivered to the insured."

The plaintiff also testified that as agent for her husband she continued to make quarterly payments upon the policy and never missed a payment up to and including the payment of April 1, 1934, which carried the insurance to July 1, 1934. She made that last payment by postal money order mailed by her to the branch office of the association at Little Rock, Arkansas, and it was there received and receipted for by the association. Mrs. Lyon also stated that she had complained to the local collecting agent of the association about his being out of the office and delaying her payments and that he had said to her:

"Now, Mrs. Lyon, don't you worry about that. Anybody that I know is good for these premiums I make out the receipt on the first of the month, anyway, and then when you are down town sometime, and I am in the office or it is convenient, you can step in and pay me."

That she made the payments that way, paid them just any place she could catch him and at any time that it was con-

venient; that most of the time it would be the first of the month when the money would come and that she would always take it and pay Mr. Hamilton. The question was put to her, "The question is, were you delayed and made your payment after the first of the month?", and she answered "Yes, sir, several times."

[fol. 64] On the first day of July, 1934, plaintiff appeared at the office of the collector for the association at Rogers, Arkansas, but was unable to find him then or at any time until July 5th when he told her to send the premium for the policy to Little Rock. She complied with his suggestion on the next day by mailing a money order in the correct amount to the association there. The association received the money order but mailed it back to the assured with the following letter:

"DEAR MR. LYON:

"You will find inclosed the money order in the amount of \$16.00, which you sent us to reinstate your policy #60J-20343, and we regret that it will not be possible for us to accept this payment as the Home Office did not send us an official receipt for you.

"We note that you are past the age of sixty years, but we are today writing our Home Office, and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement. This endorsement will mean that you will not be paid any benefits during the first thirty days of any period of disability, but should you be disabled over a long period of time, you would have the same protection as you previously had, starting on the 31st day.

"Just as soon as we receive a reply from our Home Office, we will write you, and we are enclosing a self-addressed envelope for your convenience in advising us if you would desire to keep your policy in force with the endorsement attached."

When this letter from the association was delivered at her home, Mrs. Lyon was away on a visit and on her return home word came to her of her husband's death before she opened

the letter. Mrs. Lyon produced and the court received in evidence all of the quarterly premium receipts which had been issued by the association except one for the last quarter of 1927 and one for the first quarter of 1929. For both of these Mrs. Lyon had her cancelled checks in the amount of \$16.00 each paid to the agent of the association. Each of the receipts issued by the association contained the declaration [fol. 65] that the "payment of this premium receipted for . . . keeps your policy in continuous effect . . . until 12 o'clock noon standard time [of a day specified exactly three months later than the receipt date] at which time another payment will be due."

Mrs. Lyon was the sole witness. Upon the conclusion of her testimony the association indicated that it did not desire to put on any evidence but moved for an instructed verdict in its favor. The motion was overruled and exceptions to the ruling were preserved. There was a verdict for the plaintiff under the court's direction and judgment thereon, and upon this appeal the contentions are presented:

(1) that the insurance involved was term insurance only for the term for which premium was paid in advance; that acceptance of any premium was optional with the association and it exercised its option and rejected the premium tendered after July 1, 1934, and (2) that there was no competent or substantial evidence to sustain plaintiff's allegation that the insured had paid all premiums and kept the policy in force and effect at the time of death.

1. It is not contended that the sick benefit provisions of the policy in suit which prevent the association from cancelling the insurance during any period of disability of the insured are applicable to the situation here presented. Here the claim is solely for the amounts payable under the policy for accidental death. But counsel for plaintiff points to the provisions of the policy whereby the amounts payable for accidental death are substantially increased upon each year's renewal of the policy after the first year's premium has been paid. If such accidental death occurs during the first year while the policy is in force only two thousand dollars is payable, but annual increase of two hundred dollars per year is promised until the amount of insurance for accidental death reaches four thousand dollars after twenty full year's premiums have been paid, and thereafter the accidental death benefit of four thousand dollars may be con-

tinued at a small yearly cost. Furthermore, a rider upon the policy promises that after the policy has been in force one year an additional amount, equal to all the premiums that have been paid plus compound interest thereon, shall be added to the amount of insurance for accidental death otherwise provided in the policy.

[fol. 66]. It has been ably contended that these provisions of the policy worked such a change in the insurance that it ceased to be term insurance and became in effect assimilated to life time insurance, terminable like life insurance only upon notice for failure to pay premiums after full opportunity to pay had been given. It is argued that under these provisions an insured builds up an increasing interest of value in the policy and that it would be harsh to let him be deprived of such increase at the option of the association. But we are not persuaded that the promise to make the additions to the accidental death benefits if the policy should be continued, change the nature of the insurance. It is observed that the increases in the amounts promised by the policy do not apply to the numerous other hazards covered but only to loss by accidental death, and it is not contended that the increase would cause the insurance to become unprofitable to the association or that there was any fraud in the transaction. The practice of including similar promises in accident insurance policies is not uncommon and we are not cited to any case which supports the contention that such increase of benefits works a change in the nature of the insurance. The policy very clearly provides that its term begins at twelve o'clock noon on the date of issue and ends at twelve o'clock noon on date renewal is due, and each and every receipt issued to and accepted and retained by the insured reiterated that the payment receipted for kept the insurance in force until 12 o'clock noon of the specifically named first day of the next quarter. And the declaration of the clause (c) of the policy that "the acceptance of any premium on this policy shall be optional with the association," is equally unequivocal (notwithstanding other provisions found in the same clause.*) We think the terms of

"The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

with April 1, 1927, was required to keep the policy in effect, and with the statement in the application that the premium was payable quarterly manifest the intent of the parties to contract for insurance on the quarterly payment plan. The insured began making quarterly payments of \$16.00 immediately before the date April 1, 1927, and kept them up each quarter for years, and that is what the parties meant and intended should be done.

[fol. 69] The policy evidenced a contract of term insurance which the association had a right to discontinue at any date when renewal was due. By its letter refusing a renewal receipt and returning the postal money order it did terminate the policy. The proposal to enter into a different contract was not acted upon. The term of insurance was ended prior to the accident.

Reversed and remanded.

SEPARATE OPINION

STONE, Circuit Judge, separate opinion:

I concur in the result reached in the majority opinion that this case should be reversed. I am unable to concur with the grounds stated therein for reversal.

I think the case should be reversed because of error in the peremptory instruction in favor of plaintiff. It seems to me that whether the insured had paid three-quarters of a year in advance, as testified to by plaintiff, was a matter for determination by the jury.

It seems to me that there is enough in the policy itself to justify the position of the plaintiff that there had been a payment in advance of enough money to carry this policy past the date of death. The provision in the policy which seems to me to carry this meaning is "additional provision (c)", which is set forth in the majority opinion.

When the entire policy, including the application, is considered, there can be no doubt that the annual premium on this policy was \$64.00, to be paid in quarterly amounts of \$16.00 each, and that such quarterly premiums were payable in advance. With these provisions as to premium and payment beyond question, the other provisions in the first sentence of "(c)" seem to me of determining importance.

Those provisions must be read in the light of the fact that this insurance was issued and became effective December 31, 1926.

At the above date provision (c) declared that "this policy is issued in consideration of the statements made by the insured in the application and the payment in advance [fol. 70] of (\$74.00) Dollars the first year; and the payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter beginning with April 1, 1927, is required to keep this policy in continuous effect." On its face this statement is rather puzzling and, apparently, contradictory. First it states the consideration for the issuance of the policy to be the statements in the application "and the payment in advance of (\$74.00) Dollars the first year." This statement alone would clearly mean that the premium for the first year was to be paid in advance in the amount stated. The following part of the sentence sets forth that "to keep this policy in continuous effect" it is necessary to make "payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter, beginning with April 1, 1927." Thus the apparently anomalous situation is presented of a requirement of an advance payment of \$74.00 covering the first year premium for a year which would begin December 31, 1926, and the requirement of a yearly premium of \$64.00 or quarterly payments of \$16.00 "beginning with April 1, 1927," which is only three months after the policy is issued.

It seems to me the above situation is so anomalous and ambiguous that it requires evidence to make it clear. It will not do to brush aside either the requirement of advance payment of \$74.00 for the first year or the payments of \$64.00 (or \$16.00 quarterly) beginning with April 1, 1927. Each of these is a requirement of the policy itself. Plaintiff offered evidence explaining this apparent anomaly. It seems to me that her explanation, if true, is satisfactory. It makes these provisions of the policy understandable and removes the ambiguity or conflict arising from them.

Also, I do not think it of determining importance that the policy itself does not acknowledge receipt of the \$74.00. In this respect the only inquiry is whether that amount was paid. If it was paid the policy itself shows what it was paid

the policy reserved to the association the right to refuse renewal of the policy on July 1, 1934.

2. As to the claim that the policy was paid up to the time of death. We consider first Mrs. Lyon's testimony concerning the oral agreement, between her deceased husband and the agent of the association, also deceased, at the time of the trial. By the terms of that oral agreement the association [fol. 67] was to receive from the insured and keep a sum equal to three quarterly premiums (\$48.00), and if at any time thereafter Mr. Lyon should fail to pay any quarterly payment the association was to apply sixteen dollars out of the \$48.00 to such payment and so keep the insurance in effect.

We observe that the policy provided: "This policy . . . contains the entire contract of insurance," and "no agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the association and such approval be endorsed hereon."

We think it clear that Mrs. Lyon's testimony as to her husband's oral arrangement with the deceased agent of the association was incompetent to change or extend the insurance contract sued on. The term character of the insurance and its expiration dates were definitely fixed by the policy and by the renewal receipts issued to and retained by the insured every three months for more than seven years. The policy provisions prevent recovery upon oral testimony of agreement with the local agent that the insurance was not to end as prescribed in the policy at "noon on the date renewal was due," or that the association was to continue the insurance contrary to the option reserved to it by the policy. *Gill v. Mutual Life Insurance Co.*, (C. C. A. 8) 63 F. (2d) 967 l. c. 970, 971; *Kitcart v. Metropolitan Life Insurance Co.* (C. C. A. 8) 88 F. (2d) 407 l. c. 410.

In the latter case the court said: "The contract between plaintiff and defendant upon which the law action was predicated was a written contract, and what might have been said to plaintiff by a mere solicitor would not have been binding upon the insurance company in the face of the provisions in its policy." The court held that provisions similar to those in the policy at bar constituted "a direct limitation upon the authority of any soliciting agent to bind the company by oral conversations outside of the written terms of the policy and the application." *Mutual Life Insurance*

Co. of New York v. Hilton-Green, 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202; New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934; New York Life Insurance Co. v. McCreary (C. C. A. 8) 60 F. (2d) 355.

But the plaintiff also put reliance upon a provision of the policy itself referred to as "additional provision (C)." [fol. 68] That is the only clause of the policy which indicates the price at which the insurance was issued and in which the amount of the premium required to be paid is set forth. It reads:

"(c) The copy of of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of (\$74.00) Dollars the first year; and the payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues."

On casual inspection the reference in the clause to the "payment in advance of \$74.00" might seem to imply an acknowledgment by the association that it had received a payment in advance for a year in the said sum of \$74.00, but more careful consideration of the contract convinces that the association did not intend to, and did not declare or acknowledge anywhere in the writing that it had actually received such sum or that it had received a year's premium. The meaning of the words of the policy taken in connection with the application for the policy is that the insurance was payable in advance and that the rate was \$74.00 per annum for the first year and \$64.00 per annum thereafter; that the insured elected to pay for the insurance in payments of \$16.00 per quarter and that the date April 1, 1927, written into the form was the date upon which the first paid up term expired and when the first renewal was due. The declaration of the application that the premium for the policy was \$16.00 quarterly, taken with the provision of the clause (c) that payment of \$16.00 quarterly beginning

for. The testimony of plaintiff was positive and direct that it had been paid.

Thus we have the situation of undisputed payments of \$16.00 a quarter beginning April 1, 1927, up to and including April 1, 1934. We have the testimony of plaintiff that \$74.00 was paid at the time the policy issued. We have the requirement in the policy that \$74.00 be paid in advance and [fol. 71] that this payment was for "the first year" which began December 31, 1926. We have the situation that there is no contention that any amount was paid at the time of issuance of the policy except that made by the plaintiff, which is that \$74.00 was then paid, from which it follows that unless that amount was paid there was no payment whatsoever for the insurance from its date of issue to April 1, 1927. Nowhere in the policy can there be found any semblance of a reason to believe that deceased was to receive three months of insurance without payment of premium. I am unable to escape the conclusion that the policy itself contains provisions which require explanation and that plaintiff was entitled to the judgment of the jury on the verity of the explanation to which she testified.

A true copy.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 10982

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

VS.

MRS. ZILLIAN LYON

JUDGMENT—March 19, 1938

Appeal from the District Court of the United States for
the Western District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and the same is hereby, re-

versed with costs; and that the Mutual Benefit Health and Accident Association have and recover against Mrs. Zillah Lyon the sum of One Hundred Sixty-Four and 15/100 Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

EXCEPTIONS AND MOTION FOR REHEARING—Filed April 1, 1938

Comes now the appellee, by the undersigned, her attorney of record, and respectfully states to the Court that she desires to and does hereby except to the judgment of the Court in this cause and to each finding and conclusion upon which same is based, and moves the Court to grant her a rehearing herein to the end that there may be reconsideration of the questions of law and fact involved herein and for grounds of exception and motion for rehearing, appellee states and contends as follows, to-wit:

[fol. 74] First. That the Court has failed to consider and give due effect to Clause C of the contract sued upon and has erred in its finding, that the premium for the first year was to be paid in installments and that it negatives the privilege of paying the full amount in advance and the authority of the agent to collect the sum of \$74.

Second. That the Court has erroneously interpreted the first provision of Clause C of the contract and has failed to give due consideration and effect to the fact that it clearly deals only with the payment of the premium for the first year and which alone recites the consideration upon which the policy was issued.

Third. That the Court has failed to give consideration and effect to the uncontroverted fact that if any provision of the policy is to be construed as acknowledging receipt of payment of the first premium, it is a receipt for the sum of \$74, because no other sum is mentioned.

Fourth: That the Court has failed to give due consideration and effect to the second provision of Clause "C" of the policy contract which clearly deals only with payment after premium for the first year has been paid.

Fifth. That the Court in holding that the testimony of appellee, to the effect that the premium for the first year was paid in advance, tends to contradict, or vary the terms of the written contract has failed to give due consideration and effect to the undisputed evidence that the contractual obligation of the insured, relating to payment of premium for the first year is limited to payment of \$74, and that no attempt is made to provide that the premium must be paid in quarterly installments.

Sixth. That the Court has failed to give due consideration and effect to the second provision of Clause "C" of the contract which provides that premiums may be paid, either in a lump sum of \$74 in advance, or in quarterly installments of \$16 in advance, and that if this provision has application to payment of the premium for the first year, that premium could also be paid either in a lump sum of \$74 in advance or \$26 in advance and \$16 quarterly thereafter in advance.

Seventh. The Court has failed to give consideration and effect to the well established rule of law providing that recitals of consideration in deeds and other contracts in writing are not conclusive and that parole evidence is always [fol. 75] admissible to prove the actual consideration even in the absence of allegation or proof of fraud.

Eighth. That the Court has failed to give due consideration and effect to the well established rule of law that written receipts for the payment of money are only prima facie evidence of payment and same may be rebutted by parole evidence showing the actual amount paid.

Ninth. That the Court has failed to give consideration and effect to the well established rule of law which provides that where there is ambiguity or conflict in the policy provisions, same must be construed strictly against the insurer and literally in favor of the insured.

Tenth. That the Court has failed to give consideration and effect to the rule of law which provides that debtors under contract for deferred payments of insurance premiums; rents under term leases; purchase price of realty and

personalty, the amount and time of which deferred payments are fixed by the terms of the written contract, have lawful right to prove actual payment in advance of the time and in sums greater than provided in the contract.

Eleventh. That the Court has failed to give consideration and effect to the fact that the same rules of evidence that apply to proof of payments of premiums in suits to recover the proceeds of the policy, also apply in suits to recover premiums due, and that a ruling to the contrary amounts to hold that if suit had been brought against insured in his lifetime, to recover premiums for the first year, he would have been denied the right to prove previous payment in advance, a ruling which finds no support in either justice or precedent worthy of consideration.

Twelfth. That the Court failed to give due consideration and effect to the undisputed proof that the terms of the contract do not limit the initial payment of premiums to be collected by appellant's agent to an installment of \$16 or any other sum less than \$74 and that there is a total absence of proof to show that appellant's agent acted in excess of authority.

Thirteenth. That the Court has failed to give consideration and effect to the fact that there is a total absence of proof in the record to negative the inference that appellant received the sum of \$74 premium paid to its agent in advance for the first year.

[fol. 76]. Fourteenth. That the Court has failed to give consideration and effect to the uncontroverted fact that appellant's agent was authorized to collect the first premium without limitation as to the amount to be collected.

Fifteenth. That the Court failed to give consideration and effect to the fact that appellee's testimony to the effect that the first year's premium was paid in advance is undisputed and uncontroverted and therefore it was the duty of the trial court to direct a verdict for plaintiff.

Sixteenth. That this Court erroneously construed the terms of the insurance contract to confer power upon the appellee to refuse to extend the contract of insurance after July 1st, 1934.

Seventeenth. That the Court erroneously construed the contract to be one of term insurance.

Wherefore, the appellee insists that her exceptions herein should be made a proper part of the record and duly considered and further insists that the judgment of the Court is erroneous and therefore appellee is entitled to a rehearing, and to a judgment affirming the judgment of the trial court, and, in event this Court holds that the judgment of the lower with directions to grant a new trial and for all of such relief the appellee will ever pray.

(Signed) Mrs. Zillah Lyon, Appellee, by John W. Nance, her attorney.

CITY OF WASHINGTON,
District of Columbia:

The undersigned, attorney of record for the above named appellee, does hereby certify that the above and foregoing exceptions and motion for rehearing is not filed for the purposes of vexation or delay but because he believes that there is merit in said exceptions and said motion and same is filed in order that justice may be done in the premises.

John W. Nance, Attorney of Record, for Appellee.

[fol. 77] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—April 11, 1938

The petition for rehearing filed by counsel for appellee in this cause having been considered. It is now here ordered by this Court that the same, be, and it is hereby, denied.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Filed No. 42,674. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 189. Mrs. Zillah Lyon, petitioner, vs. Mutual Benefit Health and Accident Association. Petition for a writ of certiorari and exhibit thereto. Filed July 8, 1938. Term No. 189, O. T., 1938.

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